

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

In the Matter of the Joint Application of Verizon Communications Inc. ("Verizon") and MCI, Inc. ("MCI") to Transfer Control of MCI's California Utility Subsidiaries to Verizon, Which Will Occur Indirectly as a Result of Verizon's Acquisition of MCI.

Application 05-04-020  
(Filed April 21, 2005)

**ADMINISTRATIVE LAW JUDGE'S RULING  
ADDRESSING APPLICANTS' MOTION TO COMPEL RESPONSES**

**1. Summary**

This ruling grants in part and denies in part the motion filed on July 22, 2005, by Verizon Communications Inc. (Verizon) and MCI, Inc. (MCI) (collectively, Applicants) to compel responses to three individual data requests to which Qwest Communications Corporation (Qwest) has declined to respond. The data requests seek documents relating to the competitive landscape of the telecommunications markets in California.

**2. Factual Background**

Applicants served their First Set of Data Requests on Qwest on June 2, 2005. Three of the requests are at issue in this motion:

**Data Request 3:**

Please provide all documents that describe, discuss, address or refer to the identity, strength and/or weaknesses of competitors in the provision of services referenced in data request 1 above in California.<sup>1</sup>

**Data Request 4:**

Please provide all documents that refer to, describe, discuss or address user substitution between local exchange services or minutes of use and any other mode of real time communication or minutes of use, including, without limitation, wireless service, VoIP, cable telephony, e-mail and instant messaging.

**Data Request 5:**

Please provide all documents that refer to, describe, discuss or address user substitution between long distance services or minutes of use and any other mode of real time communication or minutes of use, including, without limitation, wireless service, VoIP, cable telephony, e-mail and instant messaging.

Qwest on June 13, 2005, objected to Applicants' First Set of Data Requests on the ground, among other things, that the requests seek plans and other documents "that are affected by the proposed merger, the eventuality of which has not yet been determined." (Motion, Exhibit B.) In a June 17, 2005 letter, Applicants argued that the requests seek documents specifically related to the

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<sup>1</sup> Data Request 1 stated: Please provide all documents that describe, discuss, address or refer to your plans, projections or strategies concerning the provision in California of the following services: local exchange service; intraLATA toll, interLATA toll; Voice over IP ("VoIP"); Internet access service; broadband access service; local and intrastate data transport services; and packaged service comprising one or more of the foregoing. Please include, without limiting the foregoing, documents addressing or referring to any particular customer groups (e.g., enterprise, small business, consumer) or geographic area(s) within California to which such services would be marketed.

alleged adverse competitive effects that are raised in Qwest's protest to the application.

The parties then met and conferred and reached agreement on some of the requests to which Qwest originally had refused to provide a response.

Applicants offered to narrow the scope of the requests by reducing the time frame for documents to July 1, 2003 or later, by narrowing production to documents that specifically mention the subjects of the requests, and by limiting the documents to those at management level (vice president or above). Qwest, however, refused to provide any documents in response to data requests 3 through 5.

### **3. Position of Applicants**

Applicants assert that the data requests are relevant to the competition issues in this proceeding. They argue that Qwest has explicitly stated that the proposed transaction will have a negative impact on competition in California. For instance, Qwest in its protest stated that the application "raises grave concerns about the future of competition for telecommunications services in California and throughout the nation." (Qwest Protest, at 1.) Qwest also alleges that "[c]ombining these two companies necessarily and tangibly eliminates opportunities for competition in California." (Qwest Protest, at 5.)

Another contested issue in this proceeding is the extent to which competition from other modes of communication, such as wireless and cable, would constrain any market power that the Verizon/MCI merger may arguably have. Applicants state that their data requests 4 and 5 seek documents relevant to this issue. Applicants state that they are entitled to discover and present evidence that other carriers, such as Qwest, recognize the competitive threat

posed by non-traditional competitors, including documents analyzing loss of revenue or minutes of use to other forms of real-time communication.

#### **4. Analysis of Qwest's Arguments**

Qwest responded to the motion on July 27, 2005, and Applicants were permitted to reply to the response on July 28, 2005. Qwest argues that the data requests seek information from Qwest's corporate affiliate, Qwest Corporation (QC), an incumbent local exchange carrier not authorized to provide service in California and not a party here. Qwest argues that there is no basis for Applicants to seek data from QC in this proceeding, since QC did not file a protest, has not entered an appearance, and does not have any direct connection to California or to this case. This objection apparently was not raised previously when the parties met and conferred.

Applicants state that the information sought is relevant, and that Qwest should be required to produce documents that are in its possession or that can in the ordinary course of business be obtained from Qwest's affiliates. (*Camden Iron & Metal, Inc. v. Marubeni America Corporation* (D.N.J. 1991) 138 F.R.D. 438, 441-442 (subsidiary corporation has control over parent company's documents if "[t]here is access to documents when the need arises in the ordinary course of business" or has the "ability to obtain the requested documents on demand").) Applicants add that data request 1 is restricted to information that bears on California, and data requests 3 and 4 imply a California connection if the information sought reflects widespread substitution of communications services through intermodal alternatives. Applicants also argue that Qwest's objection was waived when it failed to bring it up in meet-and-confer sessions.

Qwest's objection was not raised in meet-and-confer sessions and should have been, since the matter might there have been resolved. Qwest did raise the

objection, however, in its boilerplate objections to the data requests, so Verizon cannot be surprised to face the objection again. While it is clear that California-related information sought from Qwest's California affiliates and its corporate parent is relevant to this proceeding and should be produced, Qwest has the stronger argument in challenging the requests as they are addressed to a corporate affiliate that does no business in California and has no direct connection to California or to this case. This ruling provides that corporate affiliates that do no business in California need not respond to these three data requests without some showing by Applicants of the relevance of that data to the California transaction or operations. However, as Applicants assert, California-related affiliate documents that *are now in* Qwest's possession and respond to the data requests should be produced.

Qwest also objects to data request 3 on grounds that it is overly broad, vague and ambiguous. Through their meet-and-confer sessions, this data request has been limited to documents dated July 1, 2003 or later, to and from officers at the vice president level or above, and that specifically mention the identify, strength and/or weaknesses of competitors in providing services in California, as more specifically identified in data request 1. Given the broad thrust of Qwest's protest to this application (i.e., that the proposed merger "necessarily and tangibly" will reduce competition in California), data request 3 (particularly as it has been narrowed) is not overly broad, nor is it vague and ambiguous. The information it seeks is either relevant or may lead to evidence that is relevant.

Finally, Qwest argues that data requests 4 and 5 are aimed at intervenors that contest Applicants' contention that other modes of real time communication, such as wireless and cable, will constrain any concentration of market power by

a combined Verizon/MCI. Qwest states that it is not among intervenors that contest that claim, and that its principal focus is on effects of the proposed merger on the market for special access to enterprise customers. Nevertheless, Qwest in its protest clearly challenges this mass market defense in concluding that the proposed merger raises “grave concerns” about the future of competition for telecommunications services in California. If the mass market effectively constrains market power, it follows that concerns raised by the proposed merger are hardly grave. Unlike some other intervenors who specifically limited the scope of their protests, Qwest has not confined its protest to special access to enterprise customers. To the extent it has documents responsive to these data requests, they must be disclosed.

## **5. Discussion**

For the most part, the documents sought by Applicants are relevant to the issues of whether the proposed Verizon-MCI merger will hamper competition and whether non-traditional forms of communication, like wireless telephones, have changed the competitive landscape in ways that impact the merger. To the extent that Qwest is concerned about the confidentiality of its marketing documents, the data can be made subject to nondisclosure agreements similar to those that apply to Qwest’s receipt of Verizon and MCI documents. (*See* ALJ Judge’s Ruling Granting, in Part, Motion for Protective Order, dated July 15, 2005.)

Applicants seek documents concerning the strengths and weaknesses of competitors in providing telecommunications services. The Commission has held that the number and strength of competitors remaining in the market after a merger is relevant in determining whether the merger would adversely affect competition. Thus, in the Enova/Pacific Enterprises merger case, the

Commission upheld an Administrative Law Judge (ALJ) ruling requiring Southern California Edison Company to produce documents relating to its “current plans in the area of competition,” and ordering sanctions for refusing to provide such documents. (*Re Pacific Enterprises* (1998) 70 CPUC2d 343.) The ALJ had found that such documents were relevant to analyzing the “competitive environment that will exist subsequent to the consummation of the proposed merger.”

Similarly, in the Telesis/SBC merger case, the Commission noted the importance of considering the future plans of potential competitors in the California markets for local exchange or intrastate services. (*Re Pacific Telesis Group* (1997) 71 CPUC2d 351.) Likewise, in the GTE/Bell Atlantic merger case, the Commission relied on the presence of other actual and potential competitors, and their relative strengths and weaknesses, in finding that the proposed merger would not adversely affect competition. (*Re GTE Corporation and Bell Atlantic Corporation* (2000) D.00-03-021, at 106.) More recently, in the SBC/AT&T proceeding (Application (A.) 05-02-057), the ALJ affirmed that Qwest has an “independent obligation to respond to Applicants’ requests seeking the basis of Qwest’s claims that competition will be adversely affected by the merger.” (ALJ Ruling Regarding Applicants’ Motion to Compel Responses From Qwest, dated July 5, 2005.) As ALJ Pulsifer ruled in the SBC/AT&T case:

Qwest objects, claiming that the burden is not on Qwest to show the changes in its business as a result of the merger, but that the burden is on the Applicants to show that the merger is in the public interest. Qwest is correct that the burden is on the Applicants to show the merger is in the public interest, but in doing so Applicants are entitled to conduct discovery concerning contrary claims by intervenors. Applicants’ burden does not relieve Qwest of its own independent obligation to respond to Applicants’ requests seeking the basis for Qwest’s claims that competition will be adversely affected by the merger. Accordingly, Qwest’s objections

to those questions do not provide a valid basis to excuse Qwest from responding. (ALJ Ruling Regarding Applicants' Motion to Compel Responses From Qwest, at 8.)

With the exception of documents held by Qwest affiliates that do not do business in California, Qwest has not provided a convincing rationale as to why it should not be required to produce responses to these three data requests to the extent that it possesses responsive documents. Accordingly, Qwest is directed to provide responses to data requests 3, 4 and 5 as specified below.

**IT IS RULED** that:

1. The Applicants' Joint Motion to Compel Responses by Qwest Communications Corporation to Applicants' First Set of Data Requests is granted in part and denied in part.
2. Parties shall promptly meet and confer as necessary to resolve specific details concerning materials to be produced and the degree of confidentiality, if any, to be accorded such documents.
3. Qwest Communications Corporation (Qwest) shall produce relevant documents that are responsive to Applicants' data requests 3, 4 and 5 of Applicants' First Set of Data Requests, as modified by agreement of the parties as discussed above.
4. Qwest need not produce documents responsive to data requests 3, 4 and 5 with respect to Qwest affiliates that do not do business in California unless Applicants make a further showing of relevance to the California transaction or operations; provided, however, that California-related affiliate documents that *are now in* Qwest's possession and respond to the data requests should be produced.



5. Qwest's production of documents in response to Applicants' data requests 3, 4 and 5 shall be made within three business days of the date of this order, unless otherwise mutually agreed by the parties.

Dated July 29, 2005, at San Francisco, California.

/s/ GLEN WALKER  
Glen Walker  
Administrative Law Judge

## **CERTIFICATE OF SERVICE**

I certify that I have by mail, and by electronic mail to the parties for whom an electronic mail address has been provided, this day served a true copy of the original attached Administrative Law Judge's Ruling Addressing Applicants' Motion to Compel Responses on all parties of record in this proceeding or their attorneys of record.

Dated July 29, 2005, at San Francisco, California.

/s/ TERESITA C. GALLARDO

Teresita C. Gallardo

## **N O T I C E**

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.